(17) (14) (4)

Nos. 86-1380, 86-1424 and 87-469

Supreme Court, U.S.
FILED
NOV 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARKANSAS PUBLIC SERVICE COMMISSION;
STATE OF ARKANSAS;
ARKANSAS-MISSOURI CONGRESSIONAL DELEGATION;
AND MISSOURI PUBLIC SERVICE COMMISSION,
Petitioners,
v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ARKANSAS POWER & LIGHT COMPANY,
Petitioner,
v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

REYNOLDS METALS COMPANY;
ASSOCIATED INDUSTRIES OF ARKANSAS;
RICELAND FOODS, INC.; AND WEYERHAEUSER COMPANY,
Petitioners,
v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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November 13, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

In the context of an interconnected, highly-integrated, multistate utility system consisting solely of wholly-owned affiliates of a public utility holding company which had established a practice of equitably sharing generation costs for over thirty years, did the Federal Energy Regulatory Commission have the authority to modify an agreement filed with it under Sections 205 and 206 of the Federal Power Act in order to remedy an unduly discriminatory allocation of generation costs among the affiliates and to fix a just and reasonable allocation which was designed to preserve the system's historic cost-sharing practice?

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BRIEF IN OPPOSITION

Respondents Occidental Chemical Corporation ("Occidental") and Georgia Gulf Corporation ("Georgia Gulf") are the two largest industrial customers of Louisiana Power & Light Company ("LP&L"), one of the operating affiliates of Middle South Utilities, Inc. ("MSU").[1] Respondent Jefferson Parish, Louisiana, is a local government entity which represents its 445,000 residents and its commercial and industrial concerns, all of whom are customers of LP&L.[2] The Louisiana Consumers were active participants in the proceedings before the Federal Energy Regulatory Commission ("FERC" or "Commission")[3] and the court of appeals below. The Louisiana Consumers support the Commission's exercise of its jurisdiction in this case as fundamental to its duties under the Federal Power Act ("FPA"), 16 U.S.C. §§ 824, *et seq.* (1982), and as necessary to eliminate an unduly discriminatory allocation of costs and to protect the interests of all consumers on the MSU system. Therefore, the Louisiana Consumers respectfully submit this Brief in Opposition to Petitions for Writ of Certiorari filed by

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[1] Pursuant to Rule 28.1 of the Court Rules, a list setting forth the parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Occidental Chemical Corporation and Georgia Gulf Corporation is included as an Appendix to this Brief.

[2] Respondents Occidental, Georgia Gulf and Jefferson Parish will be referred to collectively herein as the "Louisiana Consumers."

[3] The agency decisions below are: *Middle South Energy, Inc. and Middle South Services, Inc.*, 31 FERC (CCH) ¶ 61,305 (June 13, 1985) (Opinion No. 234) (App. 141a); *Middle South Energy, Inc. and Middle South Services, Inc.*, 32 FERC (CCH) ¶ 61,425 (September 26, 1985) (Opinion No. 234-A) (App. 97a); *Middle South Energy, Inc.*, 26 FERC (CCH) ¶ 63,044 (February 3, 1984) (ALJ initial decision) (App. 374a); *Middle South Services, Inc.*, 30 FERC (CCH) ¶ 63,030 (February 4, 1985) (ALJ initial decision) (App. 223a).

Appendix references ("App.") in this Brief are to the Appendix accompanying the petition filed by APSC in No. 86-1380. Additional references ("Supp. App.") are to the Supplemental Appendix accompanying the petition filed by Reynolds in No. 87-469.

Arkansas Public Service Commission, *et al.* ("APSC"), Arkansas Power & Light Company ("AP&L"), and Reynolds Metals Company, *et al.* ("Reynolds") in the above-named cases.[4]

STATEMENT OF THE CASE

The instant petitions challenge the authority of FERC to modify an agreement filed with the Commission under Sections 205 and 206 of the FPA, 16 U.S.C. §§ 824d and 824e, in order to achieve a just, reasonable and non-discriminatory allocation of electric generating costs among the four wholly-owned operating affiliates of MSU, a registered public utility holding company under the Public Utility Holding Company Act of 1935 ("PUHCA"), 15 U.S.C. §§ 79 *et seq.* (1982).[5] The MSU operating affiliates—AP&L; LP&L; Mississippi Power & Light Company ("MP&L"); and New Orleans Public Service Inc. ("NOPSI")—sell electric power at both retail and wholesale to customers in a four-state region (Arkansas, Louisiana, Mississippi, and Missouri).[6] These affiliates operate as a highly-integrated, fully-coordinated electric system, with all generating units controlled by the system through a central dispatch office located in Pine Bluff, Arkansas. (App. 172a; 378a).

The Commission found and the court below affirmed that the MSU operating affiliates have for more than

[4] Because the issues and arguments presented in these petitions are substantially similar, the Louisiana Consumers have consolidated their responses to the three petitions in this Brief in Opposition.

[5] The issue of the specific remedy to cure FERC's finding of discrimination—which the court of appeals found to be "virtually inescapable" (App. 73a)—is currently pending before the agency on remand. (Supp. App. 14a).

[6] While each subsidiary has been established as a separate corporation with its own board of directors, all of the common stock of each subsidiary is owned by MSU. As the sole stockholder, MSU selects the directors of each subsidiary, and MSU and its affiliates have certain common directors and officers. (App. 8a).

thirty years planned, constructed, and operated all generating units on the System on the basis of what is most advantageous and economical for the System as a whole.[7] (App. 66a-68a, 172a-189a). Each operating affiliate provides input into the System planning process, and that process takes into account each affiliate's native load demands. However, the critical decisions involving the construction of new generating units—which operating company will undertake construction, when it will do so, how large a unit will be, and what type of fuel will be used—are System decisions. The Commission and the court below specifically rejected the Arkansas parties' contentions that AP&L was an "autonomous" company which built new units solely with reference to its own needs. (App. 53a, 182a).[8]

The Commission also found and the courts below affirmed that historically the System has sought to achieve a rough equalization of generation costs among the four operating affiliates. (App. 12a, 64a, 69a, 127a,

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[7] FERC's findings regarding the integrated character of the MSU System echoes those made several decades earlier by the Securities and Exchange Commission ("SEC"):

> The record indicates that the electric properties of the four operating companies are interconnected and that since 1930 they have been constructed and operated on a systemwide basis. . . . The construction requirements of the companies are formulated on a system rather than on an individual basis. Thus, the determination of sites and ownership of generating facilities has been on the basis of the most economical and efficient installation from the viewpoint of the system's load requirements rather than the requirements of the individual companies.

In The Matter Of Electric Power & Light Corporation, 29 S.E.C. 52, 63 (1949).

[8] Petitioners attempts to revive those allegations (APSC Pet. at 5-6; Reynolds Pet. at 5-6) must be rejected. Indeed, they are contrary to the fact that for decades AP&L lacked capacity sufficient to meet its own requirements and had, instead, relied on capacity built in Louisiana to meet its needs. (App. 13a, 292a, 393a).

190a). The cost-sharing provisions of the MSU System Agreement, together with the coordinated planning for System generation needs, provided the basis for achieving this practice of equitably allocating the costs and benefits of System operations. As set forth in Section 3.01 of the System Agreement, one of its principal purposes is to provide a "basis for equalizing among the Companies any imbalance of cost associated with the construction, ownership and operation of such facilities as are used for the mutual benefits of all the Companies." (App. 9a). There have been three System Agreements in effect since 1951. While each agreement has incorporated different mechanisms to achieve an equitable sharing of generation costs, the goal of each agreement remained the same. Each of these Agreements was filed with FERC and reviewed for conformity with the requirements of Sections 205 and 206 of the FPA.

With the construction of the System's extremely expensive Waterford 3 and Grand Gulf nuclear plants, this balance was disrupted. The combined cost of these units is approximately $6 billion. This is more than double the total investment cost of all other generating units on the System, yet these two units produce only 13% of the System's electricity. (App. 15a, 287a). Both Waterford 3 and Grand Gulf were planned in the same manner as all other generating units on the System, *i.e.*, with reference to projected System needs. MSU assigned Waterford 3's construction to LP&L, which financed and built the plant. However, MP&L, the affiliate originally assigned to build Grand Gulf, was unable to finance construction of that unit. As a result, MSU formed Middle South Energy, Inc. ("MSE")[9] in 1974 as a separate corporate vehicle to finance, construct, and own Grand Gulf. All four operating affiliates participated in the

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[9] Now "System Energy Resources, Inc."

planning, financing, and construction of Grand Gulf. (App. 8a).[10]

Despite the fact that the planning for Grand Gulf began in the late 1960's and construction commenced in 1974, no allocation plan for Grand Gulf was developed and filed for Commission approval until 1982. In that year, MSU, through MSE and Middle South Services, Inc. ("MSS"),[11] filed two interrelated agreements with the Commission—a new System Agreement and the Grand Gulf Unit Power Sales Agreement ("UPSA").[12] The UPSA not only provided for a pricing mechanism for the sale of capacity and energy from Grand Gulf, but also for the allocation of cost responsibility for that unit. As filed, the UPSA proposed that AP&L be freed of all responsibility for Grand Gulf and assigned responsibility for that unit to LP&L (38.57%), MP&L (31.63%) and NOPSI (29.80%). At the same time, the 1982 System Agreement included a significant modification of the existing provision governing the sharing of generation costs. The *combined* effect of the UPSA and the 1982 System Agreement as filed would have required LP&L ratepayers to bear 100% of the cost of Waterford 3 and 38.57% of Grand Gulf, or almost 70% of the $6 billion cost of the two units. AP&L ratepayers, in contrast, would have assumed *zero* responsibility for these units' costs.

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[10] The Commission explicitly rejected "any assertion or implication by any of the parties that AP&L has had no involvement in the Grand Gulf unit or that the unit was planned only for the other operating companies." (App. 170a; *see also* App. 427a-428a).

[11] Now "MSU System Services, Inc.," the System's service subsidiary.

[12] Contrary to petitioners (*e.g.*, AP&L Pet. at 2-3), the Commission has found that, in view of the "intra-corporate" nature of transactions among MSU's affiliates, the agreements governing those transactions are not based on arms-length bargaining. *Middle South Energy, Inc.*, 31 FERC (CCH) ¶ 61,304, at 61,627 (June 13, 1985); *see also* App. 125a-126a.

In Opinion No. 234, the Commission affirmed its jurisdiction to determine "the appropriate allocation of costs among integrated companies owned by the same parent" as part of its statutory obligation to insure that interstate wholesale rates are just, reasonable, and nondiscriminatory. (App. 141a). In light of its findings concerning System integration and the historic pattern of equitably sharing generation costs, FERC held that MSU's proposed cost allocation, embodied in the filed UPSA and 1982 System Agreement, was unduly discriminatory. The Commission emphasized that the question presented was "whether the 1982 System Agreement and the UPSA, as filed, together will achieve proper cost allocation." (App. 191a). To remedy the unlawful effects of these agreements, the Commission modified each affiliate's responsibility for Grand Gulf under the UPSA.[13] FERC affirmed its findings and remedy on rehearing in Opinion No. 234-A. (App. 97a).

The United States Court of Appeals for the District of Columbia Circuit affirmed FERC's jurisdictional determinations, its factual findings concerning MSU integration,[14] and, initially, the merits of its cost allocation remedy. *Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir.) ("*Mississippi Industries*"). The court emphasized that the affirmative basis for FERC jurisdiction derived from the agency's authority under the FPA to review, and where necessary modify, agreements "affecting" rates for wholesale sales in interstate commerce:

> The distribution of Grand Gulf costs and capacity in the UPSA inevitably affects each operating company's generation costs and, by extension, their wholesale rates. When, as here, generation capacity has been

[13] Contrary to petitioners (*e.g.*, APSC Pet. at 12), the Commission did not thereby force a sale of AP&L's "low cost facilities . . . to consumers in Louisiana and Mississippi." (App. 53a n.69).

[14] None of the petitioners before the court of appeals challenged the Commission's findings of fact on the ground that they were not supported by substantial eivdence on the record as a whole.

> built and planned on a profoundly integrated basis, the Commission properly may examine its allocation as a cost component affecting wholesale rates. For this purpose, the UPSA cannot be examined in isolation. As the Commission stated, the UPSA is "an agreement which 'supplements or supersedes' the coordination arrangements among the MSU utilities, and is a contract . . . 'affecting' rates under the 1982 System Agreement."

(App. 33a-34a (footnote omitted)). The court also considered and dismissed the same arguments opposing FERC jurisdiction that had been raised in the agency proceedings below.

Circuit Judge Bork dissented on the merits of the Commission's allocation remedy, but concurred with the majority's "reasoned analysis" of jurisdictional issues, and endorsed the majority's finding "that the [MSU operating] companies are not autonomous and that decisions are made for the System as a whole." (App. 94a-95a).

By order issued April 3, 1987, the court granted rehearing *en banc* for the purpose of considering the issues concerning the merits of FERC's allocation raised in Judge Bork's dissent. *Mississippi Industries v. FERC*, 814 F.2d 773 (D.C. Cir. 1987). (Supp. App. 9a). On June 24, 1987, the *en banc* court vacated its rehearing order, and the panel granted rehearing and remanded the case to FERC for consideration of the issues addressed in the dissent. *Mississippi Industries v. FERC*, 822 F.2d 1103 (D.C. Cir. 1987); 822 F.2d 1104 (D.C. Cir. 1987). (Supp. App. 12a, 14a). FERC has invited and received comments regarding "what action the Commission should take in light of the matters remanded by the court." *System Energy Resources, Inc.*, 40 FERC (CCH) ¶ 61,078 (July 24, 1987). (Supp. App. 16a).

REASONS FOR DENYING THE WRIT

This case concerns the statutory authority of FERC under Sections 201, 205, and 206 of the FPA to modify an allocation of electric generation costs set forth in agreements among affiliates of a highly-integrated utility system that set rates for the sale and exchange of wholesale power in interstate commerce. Petitioners assert that the Commission exceeded its statutory authority in modifying the UPSA to provide that the MSU operating affiliates share equitably in the responsibility for System generation costs. The Commission's authority in this regard, however, has been firmly established by prior decisions of this Court and lower courts, and was properly acknowledged by the agency and the court below. There is no error or misconstruction below to correct, nor any conflict among the courts of appeals to resolve.

The Commission's jurisdiction over the sales for resale in interstate commerce at issue in the proceedings below is clear and fundamental. This Court has repeatedly affirmed the Commission's jurisdiction to regulate interstate wholesale power transactions in accordance with the standards of the FPA. *See, e.g., Nantahala Power & Light Co. v. Thornburg*, 106 S.Ct. 2349 (1986) ("*Nantahala*"); *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414 (1952) ("*Pennsylvania Water*"). The courts of appeals have in turn consistently recognized the exercise of federal jurisdiction over sales and exchanges among members of multistate power systems such as MSU. *See Mississippi Industries*; *Appalachian Power Co. v. Public Service Comm'n of West Virginia*, 812 F.2d 898 (4th Cir. 1987) ("*Appalachian Power*"); *Louisiana Public Service Comm'n v. FERC*, 688 F.2d 357 (5th Cir. 1982); *Ohio Power Co. v. FERC*, 668 F.2d 880 (6th Cir. 1982); *South Dakota Public Utilities Comm'n v. FERC*, 690 F.2d 674 (8th Cir. 1982); *see also Middle South Energy, Inc. v. Arkansas Public Service Comm'n*, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 884 (1986) ("*MSE*

v. APSC"). This consistent judicial acknowledgment of federal jurisdiction is simply a reflection of the recognized need for a single federal agency—rather than multiple and possibly conflicting state authorities—to oversee such interstate power transactions.

Moreover, the principal argument offered by the petitioners are cast in terms which are almost wholly divorced from the relevant facts upon which the jurisdictional determinations below were based, and which are not here in dispute. In particular, the petitioners seek to deny the affiliated, integrated nature of the MSU System and the roles of the System Agreement and the UPSA as bases for setting rates for interstate power sales among those affiliates. Acceptance of petitioners' arguments would require this Court to reassess the factual findings made below, painstakingly derived from a massive record,[15] to determine if the factual predicates for jurisdiction have been satisfied in this case. Such an inquiry is inconsistent with the deference due the exercise of an agency's expertise in this area.

Accordingly, the petitions fail to establish grounds for granting certiorari and should be denied.

I. The Court Below Rightly Held That FERC Has Jurisdiction Under The Federal Power Act To Remedy The Undue Discrimination Resulting From The Allocation Of Generation Costs Originally Proposed By MSU.

A. *FERC Possesses Jurisdiction To Modify The Grand Gulf Unit Power Sales Agreement.*

As the court of appeals emphasized, the basic jurisdictional grant of Section 201 and the directives of Sections 205 and 206, when applied in the context of this case, lead "inexorably to the conclusion that . . . FERC had jurisdiction to modify the Grand Gulf allocation set forth in the UPSA." (App. 33a). Section 201(b) of the FPA,

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[15] The Joint Appendix alone before the court of appeals consisted of approximately 4,330 pages.

16 U.S.C. § 824(b), provides that "[t]he provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." Section 205(a) of the Act, 16 U.S.C. § 824(a), declares that any rate or charge for the sale of electric energy subject to the Commission's jurisdiction that is not just and reasonable "is hereby declared to be unlawful." Section 205(b), 16 U.S.C. § 824d(b), sets forth a specific additional prohibition against "any unreasonable difference in rates, charges, service, facilities, or in any other respect, . . . between localities . . . ." Section 206(a), 16 U.S.C. § 824e(a), provides the Commission with the remedial authority to enforce the Section 205 standards:

> Whenever the Commission . . . shall find that any rate, charge . . . for any . . . sale subject to the jurisdiction of the Commission, or that any . . . contract affecting such rate, [or] charge . . . is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, . . . or contract to be thereafter observed and in force, and shall fix the same by order.

The facts of this case clearly establish FERC's jurisdiction under these statutory provisions to modify the allocation of generation costs proposed by MSU in the System Agreement and the USPA. It is this undisputed jurisdiction over wholesale rates upon which the Commission based its jurisdiction in Opinion Nos. 234 and 234-A. Power travels from the MSU generating units in interconnecting streams of sales for resale in interstate commerce, and the Commission has "complete authority to regulate all of this commingled power flow." *Pennsylvania Water*, 343 U.S. at 422. The System Agreement and the UPSA serve to define the rates for the sale of electric energy at wholesale in interstate commerce between and among MSU's affiliates. (App. 33a-38a, 105a). MSU acknowledged the Commission's Section 201 jurisdiction over these agreements when it submitted them to

the agency in 1982 for determinations of their justness and reasonableness.[16]

The Commission's recognition and the court's affirmance of FERC's jurisdiction under Section 201 are fully consistent with prior cases involving affiliated companies. *See State of Minnesota v. FERC*, 734 F.2d 1286, 1288-89 (8th Cir. 1984) (cost "coordination" transactions among three affiliated utilities which transfer interstate power among the companies and determine the intercompany charges for such power "plainly constitute" FERC jurisdictional wholesale rates); *Appalachian Power*, 812 F.2d at 902; *see also Nantahala*, 106 S.Ct. at 2356; *Nantahala Power & Light Co. v. FERC*, 727 F.2d at 1342, 1348 (4th Cir. 1984).

In addition to setting forth a uniform price to be paid for Grand Gulf power, the UPSA allocates cost responsibility for Grand Gulf among the operating companies. As found by FERC and recognized by the court below, this allocation must be considered in the context of the generation cost-sharing provisions of the System Agreement. (App. 64a, 193a). Contrary to petitioners, the UPSA is not a free-standing rate filing providing for a unit power sale between unaffiliated entities. Rather it is an important constituent component of the System's wholesale power cost allocation plan and, accordingly, directly affects wholesale rates among the operating companies.[17] The UPSA therefore is, as the Commission and

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[16] Both the 1982 System Agreement and the UPSA explicitly provide that they are subject to review and approval by FERC. These agreements are included in the Joint Appendix ("J.A.") filed with the court below. J.A. 245-46, 1562.

The APSC, in the course of criticizing as overbroad the lower court's finding that the UPSA "affects" wholesale rates, states that "[c]ontracts directly affecting rates must be filed and approved by FERC. Contracts indirectly affecting rates need not be so filed and approved." (APSC Pet. at 10 n.8). The UPSA *was* filed with the Commission for approval of its justness and reasonableness.

[17] Reynolds contends that because the UPSA did not allocate any Grand Gulf capacity to AP&L, the UPSA as filed did not thereby

the court below held, a contract within the scope of the Commission's Section 206 remedial jurisdiction.[18]

As such, the UPSA is subject to the exercise of the Commission's broad remedial authority to set just and reasonable rates. *See Pennsylvania Water*, 343 U.S. at 422. FERC cannot fulfill its statutory responsibility under Sections 205 and 206 to set reasonable, nondiscriminatory rates without the concomitant authority to supervise the allocation of costs. Petitioners appear to acknowledge that the Commission has jurisdiction to *approve* the filed UPSA and System Agreement, yet they would deny FERC the authority to *modify* these agreements. Viewed narrowly, the petitioners' arguments constitute an indirect attack on FERC's substantive finding of discrimination in this case. Viewed more broadly, petitioners' arguments represent an attempt to strip the Commission completely of its remedial powers and render its "jurisdiction" over interstate wholesale rates meaningless.

B. *The Commission's Decision Does Not Regulate Generating Facilities In Violation Of The Federal Power Act.*

Petitioners argue that the Commission's action violated Section 201(b) of the FPA, which excludes Commission jurisdiction over generating facilities, "except as specifi-

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affect AP&L's wholesale rates. (Reynolds Pet. at 18). This argument ignores the fact that AP&L's wholesale rates are affected by *both* the UPSA and the System Agreement. The attempt through the UPSA as filed to have AP&L withdraw from cost responsibility for Grand Gulf affected AP&L in an unlawfully preferential manner by giving that affiliate a significantly lower allocation of generation cost responsibility than its sister MSU companies, and thereby departed from the historic practice of integrated operation on the System.

[18] For this reason, FERC's remedy does not, contrary to Reynolds' assertion (Reynolds Pet. at 18), "invade a nonjurisdictional area" in contravention of *FPC v. Conway Corp.*, 427 U.S. 271, 279 (1976).

cally provided in this part and the part next following, ..." 16 U.S.C. § 824(b). (APSC Pet. at 8-10; AP&L Pet. at 5-7; Reynolds Pet. at 21-23). This interpretation seeks to use the "generating facilities" jurisdictional exclusion to nullify the explicit grants of Commission jurisdiction and remedial authority contained in the Act, and accordingly to frustrate *any* effective regulatory oversight of multistate power interchanges such as those set forth in the MSU System Agreement and UPSA. Nowhere, however, do petitioners explain how FERC is exercising jurisdiction over "generating facilities," except to the extent of its jurisdiction over sales for resale in interstate commerce.[19]

This Court has recognized the pervasive nature of the Commission's jurisdiction over rate-related issues affecting electric generating facilities, insofar as those facilities produce wholesale power sold or transmitted in interstate commerce. *See, e.g., Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 205-6 (1983); *United States v. Public Utilities Comm'n of California*, 345 U.S. 295, 308 (1953).[20] The Commission's authority to regulate inter-

[19] Section 201(b) explicitly states that this exclusion is applicable only to the extent the Commission is not otherwise granted jurisdiction. The exclusion of direct Commission jurisdiction over generating facilities, therefore, does not diminish the Commission's exclusive jurisdiction over sales of electric energy at wholesale in interstate commerce.

[20] Petitioners' reliance upon *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945) (*"Connecticut"*) for their "generating facilities" argument is misplaced. At issue in *Connecticut* was whether the utility was a "public utility" under the FPA subject to the Commission's jurisdiction. The Court held that the Commission has no jurisdiction over *solely* local distribution facilities even when they carry out-of-state electricity, and, therefore, that the utility, which did not engage in interstate sales for resale, was not a "public utility" subject to the Commission's accounting regulations. Petitioners here urge a broader reading—to exclude federal jurisdiction unless the facilities are used to make interstate wholesales *and* are *not* generating facilities. As discussed above, such

state wholesale rates is plenary and exclusive: the Act draws a "bright line" between federal and state jurisdiction over such rates, making case-by-case resolution of the issue unnecessary. *See, e.g., Nantahala*, 106 S.Ct. at 2356-7;[21] *FPC v. Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964). Having ascertained that the UPSA and System Agreement constituted interstate wholesale rate transactions, the court below properly found that the Commission possesses jurisdiction to regulate them in accordance with the standards of Sections 205 and 206 of the Act.

The circumstances of this case provides particularly compelling justification for the "bright line" delineating FERC's exclusive jurisdiction over interstate wholesale rates. At issue before the Commission was the impact of some $6 billion of new generation capacity on the allocation of costs among four affiliated operating companies with retail sales in four different states and subject to the jurisdiction of five state and local regulatory agencies.[22] To the extent that AP&L sought to withdraw from

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an interpretation is unsupportable. In fact, the Court in *Connecticut*—while it disapproved of the general construction of Section 201(b) offered by the court in *Hartford Electric Light Co. v. FPC*, 131 F.2d 953 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943)—nevertheless endorsed the Second Circuit's determination that generating facilities used as facilities for interstate wholesale sales are "jurisdictional facilities" under 201(b). *Connecticut*, 324 U.S. at 528 n.6.

[21] The APSC suggests that even if, *arguendo*, *Nantahala*'s declaration of federal jurisdictional supremacy applies to power purchase agreements, it does not apply to rates embodied in a unit power sales agreement. (APSC Pet. at 18-19). However, *Nantahala*'s holding, which is based squarely on the FPA's unqualified grant to the Commission of authority over all interstate wholesale rates, cannot be so artificially limited.

[22] APSC notes that this case involves "the transfer over the next ten years of more than $3.5 billion in power costs among electric consumers in four states." (APSC Pet. at 7). AP&L states that "[t]he magnitude of the populations affected and of the costs of

all responsibility for these costs, the costs borne by one or more of its sister companies must be correspondingly increased.

Thus, to the extent that the Commission declines to "interfere" with Arkansas affairs by deciding not to reform the UPSA, it necessarily increases its "interference" in the affairs of one or more of the other states that receive MSU power. Petitioners' arguments are not concerned with the question of Opinion No. 234's impact on state regulation generally, but with the parochial dollar impact of the Commission's allocation on Arkansas.[23]

If petitioners' arguments were to prevail, a jurisdictional void would be created with each state attempting to protect its economic self-interest at the expense of the other states, but lacking the legal authority or practical

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the [Grand Gulf] facility are such that virtually no element of society in these areas is unaffected by the decision below." (AP&L Pet. at 7). According to Reynolds, "[t]here are five million consumers of electric power served by the MSU operating companies in the States of Arkansas, Louisiana, Mississippi and Missouri. Each will be significantly affected by the lower court's interpretation of the Federal Power Act." (Reynolds Pet. at 10).

[23] The Eighth Circuit found that the APSC, in seeking to regulate the agreements setting forth AP&L's financial obligation for Grand Gulf, has attempted "to close its borders to high cost electricity" in order to effect a "preference" for its citizens "at the expense of out-of-state customers." *MSE v. APSC*, 772 F.2d at 417. The court forcefully stated:

> The APSC seeks to cancel the Grand Gulf agreements ostensibly because they have not received the necessary state regulatory approval. Its apparent concern . . ., however, is the economic impact on Arkansas citizens caused by AP&L's participation in Grand Gulf. Given free rein, the APSC would shift this burden to the citizens of Mississippi and Louisiana, citizens who are powerless to influence Arkansas' internal affairs.

Id. at 416-17.

ability to enforce its determinations. Indeed, such internecine sparring among the states has occurred, as the cases cited by Reynolds (Pet. at 28, n.33) in attempting to substantiate the importance of this case demonstrate.

Congress in enacting the FPA recognized the need for federal regulation "over those matters which cannot effectively be controlled by the States." S. Rep. No. 621, 74th Cong., 1st Sess. 18 (1935). As the *Appalachian Power* court emphasized, "[o]nly FERC, as a central regulatory body, can make the comprehensive public interest determination [regarding interstate wholesale rates] contemplated by the FPA . . . . No single state commission has the jurisdiction, and neither can it be expected to have the competence or inclination, to make this broad determination." *Appalachian Power*, 812 F.2d at 905. Balkanization of jurisdiction over interstate wholesale rates in lieu of comprehensive, consistent federal regulation would inevitably discourage the flow of power for resale in interstate commerce that the FPA was intended to promote and protect (*id.* at 905), and, ironically, ring the death knell for multistate, integrated power systems such as MSU.[24] Because Commission jurisdiction over MSU generation cost allocation is necessary to carry out the fundamental purposes of the Act, the petitioners' arguments must be rejected.

Petitioners suggest that the Commission's decision opens the floodgates to extensive FERC regulation of generation facilities which, they argue, is reserved exclusively to the states. (APSC Pet. at 10-13; Reynolds Pet. at 19). Nuclear facilities such as Grand Gulf are in fact

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[24] As the Eighth Circuit found:

> The integrated nature of MSU and MSE, particularly the Grand Gulf project, represents commerce that is interstate in a most basic form. . . . [A]nd the APSC must be prohibited from voiding AP&L's role in the Grand Gulf project.

MSE v. APSC, 772 F.2d at 417.

subject to an extensive, sometimes overlapping set of state and federal regulatory jurisdictions. FERC has simply exercised that exclusive authority assigned to it by Congress. The Commission has not exercised certificate authority jurisdiction over the construction of Grand Gulf, or otherwise determined its plant type, size, or location; this jurisdiction remains fully with the Mississippi Public Service Commission ("MPSC"). (App. 53a, 187a). The Commission has not exercised safety licensing authority over Grand Gulf; this responsibility remains with the Nuclear Regulatory Commission ("NRC"). The Commission has not exercised operating authority over the Grand Gulf unit; this jurisdiction remains the joint responsibility of the MPSC and the NRC. The Commission has not regulated the financing of Grand Gulf; this responsibility remains within the province of the SEC.[25]

The Commission in Opinion No. 234 did exercise its exclusive rate authority over wholesale transactions on the MSU System under the UPSA and the System Agreement. Although Grand Gulf is undeniably a "generating facility," the UPSA was required to be filed with FERC, and FERC possesses authority to review its provisions for conformity with the Act. The Commission in other contexts has considered the costs of specific generating facilities in setting wholesale rates.[26] As the

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[25] In an order denying a challenge by the APSC to MSU's purchase of MSE stock, the SEC emphasized that "contracts for the sale of electric energy among the subsidiaries of MSE [sic] are subject to the exclusive jurisdiction of FERC. . . . Our authority is limited to the financing and refunding aspects of the project." *In the Matter of Middle South Utilities, Inc.*, S.E.C. PUHCA Release No. 23579, 32 S.E.C. Docket 416, at 419 n.15, 421 (January 23, 1985).

[26] *See, e.g., Kansas Gas and Electric Company*, 39 FERC (CCH) ¶ 63,013 (April 24, 1987) (reviewing the prudency of the costs of nuclear plant construction).

court below pointed out, "FERC has not regulated a facility, but rather the wholesale rates of interstate sales within the MSU system." (App. 41a). Petitioners would construe Section 201(b)'s generation facility exclusion to negate any meaningful FERC remedial authority over wholesale rates. This result clearly could not have been intended by Congress. *See, e.g., Bird v. United States,* 187 U.S. 118, 124 (1902) (statutory provision cannot be construed in a manner that renders another portion of the statute superfluous or ineffective); *see also Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27, 49 (1980) (explicit reservation of power to the states does not operate to extend state regulatory authority to areas which would be vested to federal jurisdiction in absence of express proviso).

C. *The Commission's Decision Does Not Result In An Unlawful "Forced Purchase."*

Petitioners contend that Opinion No. 234, by modifying the provisions of the filed UPSA, "forced" the MSU operating companies to purchase power in quantities other than those "agreed to" in the UPSA and thereby violated the FPA's proscription against forced enlargement of generating facilities. (APSC Pet. at 19-20; AP&L Pet. at 6-7; Reynolds Pet. at 16-21). The "forced purchase" argument, however, rests upon a factual assumption which is bluntly contradicted by the record of this case: that the MSU operating companies are autonomous, independent utilities whose agreements among each other are the result of true, arms-length bargaining. The UPSA as filed was an "agreement" only in the sense that it implemented a cost allocation decision that had been made by the System.

The Commission and the court below rejected the "forced purchase" characterization in light of the integrated character of the MSU System and its coordinated planning for the Grand Gulf unit. To assert that AP&L did not "purchase" Grand Gulf power under the UPSA

is to ignore the substantial evidence of AP&L's intimate involvement in Grand Gulf planning, financing, and construction. AP&L was in the same position as the other three operating companies vis-a-vis Grand Gulf, an intended beneficiary of that unit's anticipated contributions to the System's power needs and responsible for an undefined, but equitable share of the unit's costs, consistent with the intent of the System Agreement and the System's historical pattern of generation cost-sharing. The filed UPSA sought FERC approval for AP&L to be freed of the responsibility for Grand Gulf which it had shared with its sister operating companies from the plant's inception.

As the Commission emphasized, and as the court of appeals affirmed, the issue of a "forced purchase" is irrelevant in a case such as this where FERC makes remedial cost allocations among affiliates with highly-integrated operations. *See, e.g., Pennsylvania Water*, 343 U.S. at 422 ("[t]he Act gives the Commission ample statutory power to order [the subject utilities] to continue their long-standing operational 'practice' of integrating their power output").[27] For this reason, APSC's argument that the opinion of the court below creates a "regulatory gap" regarding the prudence of purchases in the context of unit power sales to wholly-owned subsidiaries is without merit. As the court of appeals observed, "AP&L's supporters are not free to ignore the historical integration of the MSU system and AP&L's continuous involvement and responsibility in planning generation

[27] Contrary to Reynolds' claim (Reynolds Pet. at 26-27), *Pennsylvania Water* does not stand merely for the Commission's authority to secure compliance with its rate orders. What is significant is the nature of the Commission's order in the case, which required a recalcitrant utility to buy, as well as sell, power in exchanges with its integrated pool. It should also be emphasized that the *Pennsylvania Water* utilities, although highly integrated, were not affiliates of the same holding company parent. Thus, the inapplicability of the "forced purchase" proscription is to this extent much clearer in the present context.

capacity for that system." (App. 53a n.93). Having enjoyed the benefits of System integration for decades, AP&L and the APSC cannot now unilaterally attempt to escape the obligations inherent in participation in a highly-integrated enterprise.[28]

Moreover, because FERC's decisions in this case necessarily embodied a finding that the revised allocation was prudent, no "regulatory gap" arises. As the Fourth Circuit has recently held, the Commission's finding that a wholesale cost allocation and resultant rate is reasonable and nondiscriminatory is a binding implicit determination of "prudence." *Appalachian Power*, 812 F.2d at 903-4.[29]

It is important, finally, to emphasize that the Commission and the court of appeals have not "swept within their rulings the potential to 'reallocate' more than half

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[28] The close integration of the MSU operating companies distinguishes two cases relied upon by Reynolds (Pet. at 15 n.14). *Otter Tail Power Co. v. FPC*, 473 F.2d 1253, 1258 (8th Cir. 1973) and *Southern Company Services, Inc.*, 20 FERC (CCH) ¶ 61,332 (September 22, 1982). Those two cases involved transactions between completely unaffiliated strangers.

[29] Reynolds repeatedly asserts that *Nantahala* "assumed . . . that regulating 'the particular *quantity* of power procured by a utility from a particular source' . . . was a matter for State agencies." (Reynolds Pet. at 15; emphasis in quotation from *Nantahala* in original). However, Reynolds has quoted *Nantahala* entirely out of context. Far from affirming a state's authority to undertake prudent review of wholesale power allocated by FERC, *Nantahala* emphasizes that the state is bound by FERC cost allocation determinations:

> [W]e may assume that a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive if lower-cost power is available elsewhere . . . . But Nantahala's procurement of purchased power is *not* unreasonably large given that Nantahala could not have treated itself as having access to any more low-cost entitlement power than it is eligible to include under FERC's interpretation of what would be a fair allocation.

Nantahala, 106 S.Ct. at 2360 (emphasis in original).

of the entire nation's generating capacity." (Reynolds Pet. at 12). The decisions below were limited to the particular facts of this case, involving interstate wholesale transactions among highly-integrated affiliates of a particular single holding company. Their holdings are not automatically applicable to other, less integrated "pools."

II. No Other Arguments Have Been Offered Which Would Warrant Granting Of The Instant Petitions.

None of the remaining issues addressed by the petitioners merit consideration by the Court. The APSC and Reynolds argue that the decisions below contravene the purposes of the PUHCA by interfering with effective state regulation of the MSU operating companies. (APSC Pet. at 21-22; Reynolds Pet. at 25). This assertion, however, is directly contradicted by the provisions of PUHCA itself and the pronouncements of the SEC regarding the MSU System. Although PUHCA is intended generally to enhance state regulation of public utility companies, it expressly exempts from this policy "integrated public-utility systems"; as noted *supra* at p. 4 n.6, the SEC has found that MSU is one of these coordinated regional systems. Moreover, the SEC has pointedly emphasized that its authority over holding companies extends only to their financial transactions, while authority to regulate their power sales transactions resides exclusively with FERC. *See, supra*, at p. 18 n.24.

The APSC and Reynolds also suggest that the Court grant these petitions in order to aid resolution of the jurisdictional issues presented in No. 86-1970, *Mississippi Power & Light Co. v. Mississippi* (review granted, 56 U.S.L.W. 3204, October 6, 1987) ("*Mississippi Power & Light*"). (APSC Supp. Br. at 3-4; Reynolds Pet. at 28-9). *Mississippi Power & Light* addresses the extent to which the MPSC rate order at issue in that proceeding conflicts with or frustrates the exercise of FERC jurisdiction. The Commission's exclusive jurisdiction

over interstate wholesale rates is unquestioned and need not be clarified in the context of the present case. Moreover, the opinions below properly determined that the MSU UPSA and System Agreement set forth rates which are subject to the Commission's jurisdiction. Therefore, consideration of this case would not assist the Court's resolution of the issue involved in *Mississippi Power & Light.*

CONCLUSION

For the foregoing reasons, the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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November 13, 1987

APPENDIX

LISTING OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Pursuant to Rule 28.1 of the Supreme Court Rules, the following list sets forth all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of Occidental Chemical Corporation and Georgia Gulf Corporation:

Occidental Chemical Corporation

Canadian Occidental Petroleum Ltd.—Canada (Dominion)
Direccion Oxy, S.A. de C.V.—Mexico
HCCM, Inc.—California
Hooker Chemical Investment Co.—California
International Ore & Fertilizer Belgium, S.A.—Belgium
International Ore & Fertilizer S.p.A.—Italy
Occidental Chemical Holding Corporation—California
Occidental Electrochemicals Corporation—Delaware
Occidental Minerals (Philippines), Inc.—Philippines
Occidental Petroleum Corporation—Delaware
Occidental Petroleum Investment Co.—California
Occidental Quimica Do Brasil Ltda.—Brazil
Oxy CH Corporation—California
Oxy Chemical Corporation—California
Oxy Metal Industries (France) S.A.—France
Petway Products Distributors, Inc.—New York
Plastiflex, C.A. ("Plastiflex")—Venezuela
Sinteticos S.A. ("Sinteticos")—Columbia
Sumitomo Durez Co., Ltd.—Japan
Tri-States Phosphates, Inc.—California
Trans-Jeff Chemical Corporation—Delaware

Vinimarket-Comercio e Industria de Plasticos
Limitada ("Vinimarket")—Brazil
Vino Vinilicos do Nordeste Ltda. ("Vinor")—Brazil
Vulcan Material Plastico S.A. ("Vulcan")—Brazil

Georgia Gulf Corporation

None